**California Fair Political Practices Commission**

**MEMORANDUM**

**To:** Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

**From:** Jody Feldman, Staff Counsel
John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

**Subject:** Advertising Disclosure Regulations: Pre-notice Discussion Regarding Sections 84501-84510; (Proposed regulations and 18450.1-18450.5 and proposed amendment to regulation 18402.)

**Date:** August 31, 2001

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## I. INTRODUCTION.

This memorandum concerns pre-notice discussion of proposed regulations interpreting Government Code sections 84501-84510[1]. These government code sections, added to the Political Reform Act (the "Act") by Proposition 208, pertain to the disclosure of major funding sources for campaign advertising. This memorandum includes a brief historical background of these sections, along with a discussion on each of the proposed regulations. (Discussion of the proposed regulations begins on page 7.) This memorandum does not recommend a decision on every issue. Guidance on the major decision points is requested to facilitate a more focused discussion if the Commission wishes to proceed with adoption in November.

In drafting these proposed regulations, staff researched similar regulatory schemes already in effect in several states, including Alaska, Iowa, Texas, and Nebraska, as well as the federal regulatory scheme. Although some of the language employed in the draft regulations was borrowed directly from the federal regulations, it is important to note that there is no similar scheme to regulate ballot measures found in the federal regulations. The federal scheme relates to regulation of advertising in campaigns for elective office[2]. Nevertheless, many of the issues found in ballot measure advertising and elective office campaign advertising share common ground. Where appropriate, staff has incorporated useful language.

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[1] All references are to the Government Code unless otherwise noted.

[2] There is no preemption problem with respect to state regulation in the area of broadcast advertising. This was decided in *KVUE, Inc. v. Moore* (5th Cir. 1983) 709 F.2d 922. There, the Court held that a Texas statute requiring sponsors of political advertisements to identify themselves, while preempted to the extent it regulated federal candidates or committees, was valid to the extent it regulated advertising concerning state elections and campaigns. The case includes a discussion of the balancing of the state's interest in such disclosure against the doctrines of preemption and free speech.

## ***A. HISTORICAL BACKGROUND***

**Proposition 105:** The voters of California first attempted to regulate disclosure in political advertising through the enactment of Proposition 105 on the November1988 general election ballot. Proposition 105 contained, among other things, a provision entitled "Truth in Initiative Advertising" requiring that an advertisement favoring or opposing any statewide initiative or referendum contain a statement identifying the major funding source. The Commission adopted several regulations interpreting Proposition 105 at its April 3, 1990, meeting. The initiative was challenged as violating the "single subject" rule in the California State Constitution, and the California Court of Appeal issued a writ of mandamus halting implementation of Proposition 105 on February 8, 1991. (*Chemical Specialties Manufacturers Association, Inc. v. George Deukmejian* (1991) 227 Cal.App.3d 663.)

**Proposition 208:** Voters again succeeded in passing an initiative regulating disclosures in political advertising on the November1996 general election ballot. Proposition 208 added sections 84501-84510 to the Political Reform Act. The purpose of the advertising disclosure statutes, as enacted, was codified in section 85101. That section, now repealed with the enactment of Proposition 34, stated the purpose as "…to meet the citizens' right to know the sources of campaign contributions, expenditures, and political advertising."

Once again there was a court challenge which resulted in a preliminary injunction barring further enforcement of any portion of Proposition 208. (*California ProLife Council PAC et al. v. Scully et al*., 989 F. Supp.1282). The injunction was issued on January 6, 1998. On March 1, 2001, the court lifted the injunction with respect to sections 84501 through 84510, but permanently enjoined enforcement of Proposition 208's slate mailer disclosure provision, section 84305.5, and section 84503. On May 8, 2001, in response to the Commission's motion requesting that the court alter and amend its order, Judge Karlton issued a revised order finding section 84503 unconstitutional as applied to slate mailers only. Consequently, all provisions in sections 84501-84510 are now in effect, as well as the pre-existing section 84305.5.

This raises a question regarding whether Judge Karlton's ruling excludes slate mailers from all of the advertising disclosure statutes or just section 84503. The specific language of section 84305.5(a)(3), now permanently enjoined as unconstitutional as applied to slate mailers, provides that "any reference to a ballot measure that has paid to be included on the slate mailer shall also comply with the provisions of section 84503 et. seq." Black's Law Dictionary defines "et. seq." as an abbreviation for et sequentes, "and the following." Thus the permanent injunction against section 84305.5 may be read as removing slate mailers from the provisions of the advertisement disclosure scheme altogether. The proposed regulations are drafted to exclude slate mailers from their scope. (See regulation 18450.1, subdivision (e) of option 1 and subdivision (c) of option 2.) If the Commission wishes the staff to re-examine this issue, staff would recommend bringing this issue back for further discussion.

**Proposition 34:** This initiative, passed in November 2000, repealed most of the provisions of Proposition 208 except those dealing with advertising disclosure. Proposition 34 added several sections, previously found in Proposition 208, imposing contribution limits on candidates. Additionally, Proposition 34 added section 84511 which addresses paid spokesperson disclosures in ballot measure advertising. Staff has not included draft regulations regarding this section because there are legislative changes pending in SB 34. Section 84511 requires disclosure by a paid spokesperson in the advertising in which the spokesperson appears and is paid $5,000 or more. SB 34 shifts the disclosure burden to the committee paying the spokesperson, which is more harmonious with the other advertising disclosure statutes. SB 34 has been enrolled. Therefore, staff's thinking at this point is to wait for the outcome of the bill before drafting a regulation.[3]

### *B. OTHER CONSIDERATIONS*

The advertising disclosure provisions (sections 84501-84510) present several interpretive challenges. The provisions, as explained below, are not always harmonious with each other or other sections of the Act. In addition, some of the requirements do not seem to fit well in the real world of campaign advertising, sometimes presenting timing and logistical problems involving the updating and reconfiguring of advertisements in order to accurately disclose information to the public. Staff conducted an interested persons meeting on June 22, 2001, soliciting input from the regulated community. Comments from the Secretary of State's office, as well as representatives from Common Cause and the League of Women Voters, have also been received.

At this "pre-notice" stage of the process, a list of policy questions and options for Commission consideration are presented. Staff also presents background and analysis, putting each issue in context, to assist the Commission.

## II. STRATEGIC ISSUES.

### *A. SUMMARY OF STATUTES*

As noted in the brief historical section on Proposition 208, the purpose of sections 84501-84510 was to meet the citizens' right to know the sources of campaign contributions, expenditures, and political advertising. (The statutes are attached as Exhibit 1.)

#### *1. Definitions in Advertising Disclosure*

Section 84501 defines the term "advertisement," which circumscribes the scope of the advertising disclosure scheme set out in sections 84503-84510 by laying the basic foundation for what is being regulated. This definitional section also contains a

[3] Additional changes may be presented to the Commission if SB 34 is enacted.

subdivision excluding certain items and communications from the basic definition of "advertisement."[4]

Another definitional statute, section 84502, addresses "cumulative contributions," as that term will be used in section 84503. This memorandum will discuss related issues regarding whether the term "cumulative contributions" is to be imputed to section 84504, which imposes a committee name identification requirement on major donors of $50,000 or more without specifying if that amount is "cumulative," or section 84506, which deals with disclosure of the two highest "aggregate" contributors in the context of independent expenditures.

*2. Disclosures Required*

Sections 84503, 84504, and 84506 require certain disclosures in advertisements. The first two statutes require a disclosure statement in ballot measure advertising. The third, section 84506, includes both ballot measure advertising and candidate advertising in its disclosure requirements. Different information is required in the disclosure statements, depending on which section applies.

Section 84503 requires a disclosure statement identifying any person whose cumulative contributions are $50,000 or more. Subdivision (b) of that statute instructs that if there are more than two such donors, the committee is required to disclose only the highest and second highest donors. As previously indicated, this statute only applies to ballot measure advertising.

Section 84504 outlines how a committee must identify itself in its name when advertising in support or opposition of a ballot measure. This section seems to *add* to the requirements found in section 84503 by specifying that a committee identify itself with a name or phrase that "clearly identifies the economic or other special interest of its major donors of $50,000 or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101."

Thus far, in ballot measure advertising, these statutes require disclosure of the two highest contributors of $50,000 or more, and committee identification including the economic or special interest of its major donors of $50,000 or more. Section 84504 goes on to require that if the major donors of $50,000 or more share a common employer, the identity of the employer shall also be disclosed in the advertising. The statute further requires that any committee that supports or opposes a ballot measure shall print or broadcast its name as provided in this section as part of any advertisement or *other paid public statement*.

[4] There is some ambiguity in this subdivision regarding language excluding "a communication from an organization other than a political party to its members…." This issue is discussed later in this memorandum as a decision point.

Section 84504 reaches beyond the advertising arena in requiring that a committee name contain certain information *in any reference to the committee required by law*. The section specifies that this includes the committee's statement of organization, filed pursuant to section 84101.

The next section to require a disclosure statement is 84506. This is the first section that seeks to govern both ballot measure advertising and candidate advertising. The common thread here is that this applies to broadcast or mass mailing advertisements, advocating the election or defeat of any candidate or ballot measure, funded by *independent expenditures*. This section adds yet another requirement to some advertising disclosures. "If the expenditure for a broadcast or mass mailing advertisement…is an independent expenditure, the committee…shall include on the advertisement the names of the two persons making the largest contributions to the committee making the independent expenditure. If an acronym is used to specify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements."

One of the confusing aspects of section 84506 is its method for determining the two contributors to be disclosed: it requires the contributions of each person to the committee making the independent expenditure during the one-year period before the election be *aggregated*. This raises the question of whether the "cumulative contributions" definition in section 84502 should be applied to determine the two highest contributors. Or does the term "aggregated" mean something else entirely? This section also raises the issue of whether the $50,000 cumulative amount threshold found in the other disclosure statutes should be imported to sections 84503 and 84504, in determining how to calculate who shall be disclosed. This memorandum more fully discusses these issues as decision points later on.

Section 84508 can also be classified as a disclosure statute, although it really serves to limit the scope of the disclosure required under sections 84503 and 84506 to a committee name and its highest major contributor, if the advertisement is of a smaller scale, as specified in the section.

Thus far, then, there are many different name identification requirements for advertising disclosure contained in these statutes, several of which are not mutually exclusive. Rather, they can be viewed as "layered," calling for more and more disclosure information.[5]

[5] For example, a print advertisement for or against a ballot measure, measuring 30 square inches, which is funded through independent expenditures, must include in the advertisement the committee name (section 84504); the committee name must include a name or phrase clearly identifying the economic or other special interest of its major donors of $50,000 or more (section 84504(a)); the names of the two persons making the largest contributions to the committee making the independent expenditure (84506); and possibly the name of the common employer, if the two largest contributors share a common employer (section 84504(b)).

Another statute loosely fitting under this category is section 84509, requiring that when a committee files an amended campaign statement pursuant to section 81004.5, the committee shall change its advertisements to reflect the changed disclosure information.

*3. Technical Implementation of Disclosure Information*

One statute within the advertising disclosure scheme sets out the minimum standards for presenting printed statements or broadcast communications so as not to render the disclosure statutes meaningless. Section 84507 requires that "any disclosure statement required by this article shall be printed clearly and legibly in no less than 10-point type and in a conspicuous manner as defined by the Commission or, if the communication is broadcast, the information shall be spoken so as to be clearly audible and understood by the intended public and otherwise appropriately conveyed for the hearing impaired." This statute allows the Commission to adopt regulations that will insure that any disclosures required by these statutes would present the information in a conspicuous manner. Staff has presented, in proposed regulation 18450.4, technical language to assist the regulated community in complying with this statute, as well as several options for a form in which to present some of the required information.

*4. Enforcement Provisions*

Finally, the advertisement disclosure statutes contain several provisions designed to assure compliance with the requirements. Section 84505 generally warns against creating or using noncandidate controlled committees or nonsponsored committees to avoid, or that result in the avoidance of, the disclosure of any individual, industry, business entity, controlled committee, or sponsored committee as a major funding source. This section also includes language establishing liability for persons "acting in concert" to achieve such avoidance. Section 84510 actually outlines the enforcement remedies available for a violation of the statutes.

## ***B. THE SCHEME***

As illustrated above, there are two distinct sets of advertising disclosure rules. One set covers disclosure in political advertisements related to *ballot measures.* (Sections 84501-84504.) The second set addresses political advertising that is an *independent expenditure* paid for by a committee, whether the advertisement relates to a candidate or a ballot measure. (Section 84506.) These sections present a complex statutory scheme, resulting in a "layering" of requirements. Staff has tried to outline some of the major components of the scheme, and how they fit together, in the Table of Advertising Disclosure Statutes, attached as Exhibit 2.

## III. PROPOSED REGULATIONS.

### *A. PRELIMINARY MATTERS*

A threshold question that has been identified by staff is the determination of the reach of this specific regulatory scheme. The language of the statutes appears to apply to all committees. However, as noted above, the rules found in the advertising disclosure sections of the Act focus on disclosure of large contributors. Receipt of contributions is a characteristic inherent in "recipient committees" as identified in section 82013(a). Recipient committees are individuals and organizations that receive contributions--$1,000 or more in a calendar year--to support or oppose state or local candidates, or to qualify, support or oppose state or local ballot measures, including initiative, referendum and recall measures (either primarily formed to support or oppose a single candidate or ballot measure, or more than one candidate or measure being voted on in a single election, or general purpose to support or oppose a variety of candidates and/or measures).

The other types of committees recognized under the Act, major donor committees (individuals or entities that use their own money, i.e., personal funds, corporate or business funds, to make contributions totaling $10,000 or more in a calendar year to candidates or to committees supporting or opposing candidates or ballot measures) and independent expenditure committees (individuals or entities that use their own money to make "independent expenditures" totaling $1,000 or more in a calendar year to support or oppose candidates or measures) do not receive contributions. (Sections 82013(b), (c).)

Since the statutory scheme requires disclosure of major contributors, application is limited to those committees that receive contributions (i.e., recipient committees). This application is reflected in proposed regulation 18450.1, subdivision (f) of option 1 and subdivision (d) of option 2.

### *B. REGULATION 18450.1-DEFINITIONS. ADVERTISEMENT DISCLOSURE.*

Subdivision (a) of this regulation defines the term "advertisement" for purposes of implementing the provisions of sections 84503, 84504, 84506, 84508, and 84510. The statutory language refers to "general and public advertisement" (Section 84501)[6] and

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[6] Section 84501 provides:

> (a) "Advertisement" means any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures.
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> (b) "Advertisement" does not include a communication from an organization other than a political party to its members, a campaign button smaller than 10 inches in diameter, a bumper sticker smaller than 60 square inches, or other advertisement as determined by regulations of the Commission.

"broadcast or mass mailing advertisement" (Section 84506)[7]. Both sections 84501 and 84506 focus on advertisements by means of mass communications media. Therefore, it seemed appropriate to define these terms in one regulation. However, there are some subtle differences between the two sections that are addressed in the proposed regulation.

In clarifying which types of advertising are subject to the rules, staff attempted to use existing definitions in the Act such as the definition of "mass mailing" found in Government Code section 82041.5.[8]

**{Decision Point 1} - How to define "advertisement."**

Two options are presented for defining "advertisement." **Option 1** consists of a "laundry list" of specific items to be regulated. The list is culled from the federal regulations (11CFR section 110.11) as well as language found in a number of other states' statutes regulating advertising disclosure. The advantage to this approach is that it presents unambiguous guidelines regarding what the Commission is regulating. The disadvantage is that the list may not be all-inclusive. There may be many permutations of political advertising yet to be explored that would not be covered by the "laundry-list" approach. Staff has, however, included a "catch-all" subdivision (a)(7) so that advertising can be evaluated on a case-by-case basis.

The "laundry list" approach includes six separate subdivisions as well as the seventh "catch all" subdivision. Subdivision (a)(1) deals with radio, cable television, and regular television broadcasts.

Subdivision (a)(2) essentially defines phone bank-type telephone messages. There is a choice offered, in brackets, of what should be the minimum threshold applied in regulating this type of advertising **{Decision Point 1a}**. The choice of 200 stems from the already-existing definition of a "mass mailing" found in section 82041.5. Staff included other options (500 and 1,000) that may be more appropriate to the term "advertisement."

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[7] Section 84506 provides:

> If the expenditure for *a broadcast or mass mailing advertisement* that expressly advocates the election or defeat of any candidate or any ballot measure is an independent expenditure, the committee, consistent with any disclosures required by Sections 84503 and 84504, shall include on the advertisement the names of the two persons making the largest contributions to the committee making the independent expenditure. If an acronym is used to specify any committee names required by this section, the names of any sponsoring organization of the committee shall be printed on print advertisements or spoken in broadcast advertisements. For the purposes of determining the two contributors to be disclosed, the contributions of each person to the committee making the independent expenditure during the one-year period before the election shall be aggregated. (Emphasis added.)

[8] "'Mass Mailing' means over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry." (Section 82041.5.)

Subdivision (a)(3) regulates direct mailings and offers the same bracketed choice of threshold levels **{Decision Point 1b}.** There is language in both subdivisions (a)(2) and (a)(3) that applies the threshold to phone calls and direct mailings "intended for delivery…to more than (whatever threshold is chosen) persons." This clears up any notion that the first calls or mailings, those being made prior to reaching the threshold, do not have to include any disclosures. The regulation provides that the disclosures are required on all calls and mailings, from the first to the last, so long as the threshold is intended to be reached.

Subdivision (a)(4) applies the definition of advertising to newspapers, periodicals, or magazines of general circulation. This language, "general circulation," differentiates these publications from the limited-circulation publications of member-communications.

Subdivision (a)(5) spells out some of the physical types of items on which an advertising disclosure should be included. These are items where it is not impractical to include such disclosures, such as billboards, posters, yard signs, etc.

Subdivision (a)(6) applies the definition of advertisement to electronic broadcast communications, such as a website. Websites generally have a distinct origin, but a rather amorphous target audience. Staff has presented, in brackets, an alternative to include broadcast communications made on the Internet as well **{Decision Point 1c}**. This would include the area of e-mail communications in addition to websites. This is a wide-open area in terms of the issue of federal preemption. Currently, there is no federal regulation in the area, but that is subject to change. The Internet has increasingly become a tool for advertising, as well as political campaigns in general. There is no reason to believe this trend will not continue. Additionally, there is the concern as to where such advertising originates and who is really responsible for "broadcasting" such information. However, staff wanted to include this option for Commission consideration.

Subdivision (a)(7) appears as the "catch all" so that any area of advertising that might be beyond the expertise of staff would also be subject to regulation.

Subdivisions (b) and (c) refine the definitions of "broadcast" advertisement and "mass mailing" advertisement, as those terms appear in section 84506. That section, which deals with disclosure of major donors to a committee that makes independent expenditure applies only to "broadcast or mass mailing" advertisements. These subdivisions spell out which subdivisions in regulation 18450.1 apply to section 84506.

In **Option 2** staff presents a regulation with a more generalized approach. The definition is presented in general terms to give the regulated community an *idea* of what an advertisement is, without precluding or excluding any particular type of advertisement. This option presents **Decision Points 1a through 1c** together in 18450.1(a)(1). While this option has the advantage of allowing for regulation on a case-by-case basis, it does not provide much guidance to the regulated community in determining exactly what forms of advertising are being regulated.

Both options outline a few specific exclusions from the definition of "advertisement" (subdivision (d) of option 1 and subdivision (b) of option 2). Staff drafted language that expands on the list of exempted items. This language was taken from the federal regulations and is worded in such a way as to leave room for interpretation on a case-by-case basis.

As discussed earlier, each option also includes subdivisions to address the "slate mailer" exclusion and the application to "recipient committees" only.

**Staff Recommendation:**

Staff is recommending **Option 1** for its specificity.

**{Decision Point 2} - Are political party communications to their members excluded from regulation? Are member organization communications, other than those from political parties, to their members exempted?**

Section 84501 provides an additional interpretive challenge. Section 84501 provides: " 'Advertisement' does not include a communication from an organization other than a political party to its members…." However, the intent behind this provision is unclear. Are political party member communications exempt or are member organization communications, in general, exempt? How does this language mesh with section 85312[9] regarding "member communications?" Presented here are two versions of the same sentence with different punctuation to help illustrate the alternate ways that this section can be interpreted:

1) "Advertisement does not include a communication from an organization, other than a political party, to its members…"

2) "Advertisement does not include a communication from an organization, other than a political party to its members…"

Case law supports the rule that if an act as originally punctuated does not reflect its true intent, the punctuation may be construed in a manner to effectuate its intent.[10] "[Obvious] clerical or typographical errors ... would not be permitted to have the effect to render the statute absurd." Here the statute has no punctuation, so it is necessary to attempt to reconcile the language with the intent.

"In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute… If there is ambiguity,

[9] Government Code section 85312 states that, "For purpose of this title, payments for communications for purpose of this title to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or independent expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements."
[10] *Randolph v. Bayue*, (1872) 44 Cal 366.

however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history." *Estate of Griswold*, No. S087881, 2001 WL 694081, at *3 (Cal. Sup. Ct., June 21, 2001). Lacking an extrinsic source of legislative intent, the Commission would turn to the "ostensible objects to be achieved" by the Act. Section 85102(g) of Proposition 208, states that the new measure is enacted to accomplish the following purpose:

> "To meet the citizens' right to know the sources of campaign contributions, expenditures, and political advertising."

However, this section was repealed with the enactment of Proposition 34 in November 2000. Two of the uncodified sections of Proposition 34, subsections 1(b)(5) and 1(b)(7), state that the new measure is enacted to accomplish the following purposes:

> To increase public information regarding campaign contributions and expenditures; and
>
> To strengthen the role of political parties in financing political campaigns by means of reasonable limits on contributions to political party committees and by limiting restrictions on contributions to, and expenditures on behalf of, party candidates, to a full, complete, and timely disclosure to the public.

An interpretation that would exempt all communications from organizations, regardless of who receives them, as in example two above, does not appear consistent with this intent. This placement of the comma hardly makes sense because it allows *all* communications from membership organizations to be exempted from regulation under the advertising disclosure statutes.

The Commission is presented with options regarding whether political party communications, or those from a member organization to its members only, are exempted from the regulations.

Proposed regulation 18450.1, **options 1 (subdivision (d)) and 2 (subdivision (b))** both contain a subdivision to give meaning to this sentence in accordance with the above discussion. The choice presented to the Commission in both options reads as follows:

'A communication from an organization to its members [, other than a communication from a political party to its members].'

**Staff Recommendation:**

Staff believes the comma should be read as shown in the bracketed portion of the statement, which would result in an interpretation that excludes membership communications from the definition of "advertisement," while including political party

member communications in the definition of "advertisement." Staff recommends inclusion of the bracketed language.

***C. REGULATION 18450.2-CUMULATIVE CONTRIBUTIONS. ADVERTISEMENT DISCLOSURE.***

Another interpretive problem presents itself when trying to define and apply section 84502 dealing with "cumulative contributions." The term "cumulative contributions" is used in section 84503 to tell us who shall be disclosed in ballot measure advertisements. Section 84502 defines "cumulative contributions" as beginning the first day the statement of organization is filed under section 84101. The definition is important because it determines which contributors, if any, must be disclosed in the ballot measure political advertising. Some committees have been in existence for many years, and may not have amended their statements of organization for quite some time. A literal application of the statute could result in the disclosure of large contributions made many years ago for reasons unrelated to the current advertisement for the current ballot measure. This results in potentially misleading disclosures, actually hiding the identities of the *current* "big money" contributors[11].

This proposed regulation construes section 84502, defining "cumulative contributions" for purposes of section 84503 and section 84506, dealing with independent expenditures. It does this by creating a framework of specific "cumulation" periods applicable to these statutes. While other sections (sections 84504 and 84508) do not use the phrase "cumulative contributions," staff believes for continuity, the same definition should apply as discussed below.[12]

Proposed regulation 18450.2(a)(1-2) defines "cumulative contribution" as it applies to section 84503, and section 84508, which references section 84503. Section 84504 does not use the term "cumulative contribution" anywhere in its provisions. However, it requires identification, in a committee name and in any reference to the committee required by law, of the special or economic interest of its major donors of $50,000 or more. One way to interpret this is to apply the notion that this $50,000 threshold is "cumulative," as expressed in section 84503.

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[11] For example, consider a general-purpose recipient committee which has been in existence for some time, and which opposed a ballot measure in 1990. A person, *X*, contributed a large amount (more than $50,000) to the committee for the 1990 effort. Time passes, and the committee now wants to place a political advertisement for (or against) a current ballot measure. *X* has not contributed to the committee since 1990, and does not do so now. However, since *X's* earlier contribution is still the largest disclosable contribution to the committee, *X* would have to be disclosed on the current advertisements. Not only is this information unhelpful, it may actually be harmful and misleading because it hides the current "big money" contributors from the public and defeats the purpose of the statute.

[12] Words or clauses may be enlarged or restricted to harmonize with other provisions of an act. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act. (*People v. Morris* (1988) 46 Cal.3d 1, 249.)

If the Commission agrees with this approach, the Commission, by choosing to adopt subdivision (a) is choosing to apply a standard definition of "cumulative contribution" to the entire advertisement disclosure scheme.

Section 84506 presents a similar issue. Section 84506, which establishes advertisement disclosure thresholds for independent expenditures on ballot measure and candidate advertising, requires disclosure of the two persons making the largest contributions to the committee, *aggregated* during the one-year period prior to the election. Proposed regulation 18450.2 treats the term "aggregated" the same as "cumulative" to establish a consistent method to calculate which contributors are to be disclosed in an advertisement or who should appear in a committee's statement of organization.

**{Decision Point 3} - What time frame constitutes the "cumulation" period in sections 84503, 84504 and 84508?**

In subdivision (a) of proposed regulation 18450.2, staff has drafted language limiting the time period applicable to the "cumulation" of contributions as it applies to section 84502. This results in a more accurate disclosure to the public. Staff has presented the Commission with a choice of 12 months or 24 months for cumulating contributions **{Decision Point 3}**. This choice serves the purpose of providing the regulated community with a specific time frame within which to operate for purposes of calculating who must be disclosed in the advertisements and amended statements of organization. It can be argued that the 24-month time frame seems best suited to "capturing" the information about "big money" contributors. It can also be argued that a 12-month time frame is more consistent with the statutory scheme because such a time frame is set out as mandatory in Government Code section 84506, dealing with independent expenditure disclosures. It was thought that having one time frame for aggregating contributions, regardless of which disclosure section is applied, might simplify the advertising disclosure scheme.

Section 84502 also contains language ending the cumulation period "within seven days of the time the advertisement is sent to the printer or broadcast station." While this language is ambiguous as to whether it encompasses seven days (prior to *and* subsequent to) or just (prior to *or* subsequent to) sending the advertisement to a printer or broadcaster, the intent of the drafters and the voters can be served by interpreting this language as ending the cumulation period seven days *prior* to the advertisement being disseminated because the advertisement must contain the proper, accurate disclosure *prior* to being disseminated. The draft regulation makes it clear that the cumulation period ends seven days prior to the advertisement being sent to a printer or broadcaster. This time period allows for accurate disclosure while allowing the regulated community enough lead-time to prepare their advertisements.

**{Decision Point 4}[13] - Is the $50,000 threshold from sections 84503 and 84504 imported into section 84506 (Independent Expenditures)?**

Section 84506, which sets forth the disclosure requirements applicable to *independent expenditures* for advertising advocating the election or defeat of "*any candidate or any ballot measure,*" includes the phrase "…consistent with any disclosures required by sections 84503 and 84504…." The issue is whether this language is meant to import the $50,000 threshold for disclosure found in the referenced statutes.

Section 84503 requires a disclosure statement triggered by contributions of $50,000 or more. Sections 84504 (a) and (b) also require a trigger of $50,000 or more. Section 84504(c) requires disclosure of the committee name, without reference to any monetary threshold. The language "…consistent with any disclosures required…" can be interpreted as assuring that all disclosure requirements are met in any event, *in addition* to anything required by section 84506, thus importing the $50,000 threshold. This interpretation may balance the intended goal of disclosing the funding behind "hit pieces," while still lending meaning to the phrase in question. Additionally, using the standard $50,000 threshold has the advantage of consistency in what is otherwise a complicated regulatory scheme. This **option** is contained in brackets at proposed regulation 18450.2(b).

Another **option**, which is found in proposed regulation 18450.2(b), minus the bracketed language, requires disclosure of the two largest "reportable" contributors. This makes sense from the standpoint of disclosing the two persons making the largest contributions, regardless of amount, and allows other features of sections 84503 and 84504 to be "imported," consistent with the language of section 84506. This option perhaps allows for less "manipulation" on the part of donors or recipients, but it does serve to complicate the scheme. This option also deals more adequately with the different language used in the two statutes and the omission of the dollar threshold from section 84506.

**Staff Recommendation:**

Staff recommends importing the $50,000 threshold as being consistent with the language and easier to apply.

Proposed regulation 18450.2 (c) sets a beginning date for the cumulating of contributions. The date is set at January 1, 2001 for ease of calculation.

***D. REGULATION 18450.3-COMMITTEE NAME IDENTIFICATION. ADVERTISEMENT DISCLOSURE.***

This regulation focuses on identification of a committee for disclosure purposes. Section 84504 provides:

[13] Proposed regulation 18450.4 is also impacted by this decision point.

a) Any committee that supports or opposes one or more ballot measures shall name and identify itself using a name or phrase that clearly identifies the economic or other special interest of its major donors of fifty thousand dollars ($50,000) or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed pursuant to Section 84101.

(b) If the major donors of fifty thousand dollars ($50,000) or more share a common employer, the identity of the employer shall also be disclosed.

(c) Any committee which supports or opposes a ballot measure, shall print or broadcast its name as provided in this section as part of any advertisement or other paid public statement.

(d) If candidates or their controlled committees, as a group or individually, meet the contribution thresholds for a person, they shall be identified by the controlling candidate's name.

The statute requires that the committee name include identification of the economic or special interest of a $50,000 or more contributor outside the "advertisement" context. This could present a burden on a committee to frequently amend its statement of organization, or where a reference is otherwise required by law, to change the name of the committee.

This requirement presents interpretive problems due to its potentially broad application.[14] Given the entire context of these statutes and their concurrent enactment as they apply to "advertisement disclosures," staff has drafted language reflecting this interpretation in the proposed regulations (See for example, regulation 18402(c)(2).)

Language has also been included to further limit its application to "primarily formed" committees, as defined in section 82047.5(b) and (d). **{Decision Point 5}** These are committees that are formed for the purpose of supporting or opposing ballot measures. Restricting application of the naming requirement to these committees would further narrow the scope of this provision.

**{Decision Point 6} - How do we require disclosure of "economic or special interests"?**

There is also the interpretive question regarding what is meant by the terms "economic" or "special" interest. In considering the purpose of the statutory scheme it seems that there is an effort to assure that advertising disclosure more accurately reflects the motivation of the parties funding the advertising. Often this is an economic motive, but it can be a social, environmental, or political motive as well. Perhaps the term

[14] For example, suppose R.J. Reynolds qualifies as a major contributor to a committee placing a ballot measure advertisement. In the minds of many, R.J. Reynolds is part of the "tobacco industry;" such people would expect a disclosure like "tobacco industry" in the committee name. However, R.J. Reynolds also makes macaroni and cheese (it owns Kraft Foods.) The name disclosed should reflect the special interest as related to the specific ballot measure.

"special interest" was designed as a catch-all phrase to assure that somehow the public should be apprised of the interests held by the money behind the advertising, especially when the advertisement itself does not make it clear who the sponsor might be.

Staff provides several options for the Commission to consider regarding the dilemma of defining what is the "economic or special interest" to be disclosed. **Option 1** is no regulation at all. This leaves the area wide open to interpretation on a case-by-case basis. This also provides no guidance to the regulated community.

**Option 2** amends regulation 18402 (committee names). This option does not attempt to define what is meant by the "economic or other special interests" of major donors. It merely adds to this regulation the new name identification requirement and it adds a reference to the name identification requirements already required for sponsored committees (Regulation 18419). This **option** also contains **{Decision Point 5}**, discussed above, which limits these disclosure requirements to "primarily formed" committees, as defined in sections 82047.5(b) and (d). (The regulations are attached in numerical order. Therefore, options 1 and 2 are included in the first page of the attached regulations. Proposed regulations 184501. – 18450.5 follow.)

**Option 3** creates a new regulation, regulation 18450.3. This option tries to delineate what is meant by an "economic or special interest." This option requires the committee identification to somehow be related to the particular ballot measure advertisement in question, to serve the purpose of the statute. This **option**, in subdivisions 1-2, attempts to lay out specific criteria for the regulated community regarding what must be disclosed if they are a business entity, a labor organization, or a non-profit entity. The criteria are designed to forge a link between the entity's "industry, goal, or purpose," and the specific ballot measure being advertised. The problem with this approach is that the concept may be too multifaceted, and the "real world" too complex to draft comprehensive language fitting every situation. Staff believes that more work is needed to refine this proposed regulation, should the Commission wish to follow this approach.

## ***E. REGULATION 18450.4-CONTENTS OF DISCLOSURE STATEMENTS. ADVERTISEMENT DISCLOSURE*.**

This regulation attempts to assist in the application of section 84507, which outlines, in general terms, how the disclosure statement should be presented. Section 84507 states:

"Any disclosure statement required by this article shall be printed clearly and legibly…and in a conspicuous manner *as defined by the Commission* or, if the communication is broadcast, the information shall be spoken so as to be clearly audible and understood by the intended public…."

This language can be interpreted as allowing the Commission to define both the contents and presentation required of the disclosure statements to assure that the manner in which they are presented is "conspicuous."

The Commission is asked to consider what must be contained in the actual *disclosure statement* related to ballot measure advertisements. Staff has presented three options for consideration.

**{Decision Point 7} – What should be contained in the actual "disclosure statement" required by sections 84503, 84506, and 84507?**[15]

**Option 1** suggests a short "marker phrase" simply identifying who contributed "major funding." While technically this comports with the statute, it does little to present information to the public regarding "big money" and special interests.

**Option 2** suggests a longer "marker phrase" which includes the fact that the contributor contributed $50,000 or more to the committee placing the advertisement. This statement does disclose more information regarding ballot measure financing without being too burdensome on the regulated community.

**Option 3** requires disclosure of the exact amount contributed, along with who made the contribution. This option results in the clearest disclosure to the public, but may be viewed as more burdensome by the regulated community.

The options presented are simplified versions of those found in the Iowa Administrative Code. (IA ADC 351-4.70(56,68B).) There, the State of Iowa, in adopting regulations interpreting Iowa Code section 56.5, requires different disclosure statements depending on who is paying for the advertisement and how much is being spent. For example, if an advertisement is being paid for by an individual acting independently, and the cost is over $500, the advertisement must contain the words "paid for by" followed by the full name and complete address of the person. If the advertising is paid for by a corporation involved in a ballot issue, but the corporation has not organized a committee because it has not exceeded $500 in activity, the statement shall contain the full name and address of the corporation, as well as the name and office designation of one officer of the corporation. On the other hand, Iowa only requires the phrase "paid for by…" if the advertisement is paid for by the candidate or the candidate's committee. These are but a few of the eight variations on the theme contained in the Iowa disclosure statement regulations.

The next subdivision instructs that any disclosures required by these statutes be presented in a clear, legible, or audible format, in a conspicuous manner, so as not to render the entire article pointless. First, in subdivision (a) we present a general requirement that advertisements be clear, conspicuous, etc. This regulation could suffice by itself, or be combined with the addition of subdivisions (b-g), with specific language spelling out what is meant by "clearly and legibly." The specific language used in this draft regulation comes from the federal regulations (*supra*).

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[15] Options 1, 2, and 3 in subdivision (a) apply to section 84506 only if the Commission chooses to include the bracketed language in Decision Point 4. If the Commission rejects the bracketed language in that decision point, the bracketed language referencing section 84506 here should also be deleted.

***F. REGULATION 18450.5-AMENDED ADVERTISING DISCLOSURE AND STATEMENTS OF ORGANIZATION.***

Section 84509 requires that advertising be revised to reflect changed disclosure information when a committee files an amended campaign statement pursuant to section 81004.5. Staff has drafted a proposed regulation outlining a timeline within which to amend advertisements to reflect the accurate information.

Proposed regulation 18450.5 requires certain amendments to both the statement of organization and the advertisements themselves by one of two triggering circumstances related to other sections in this Act.

(a) When a new person qualifies as a major contributor under either section 84503 or section 84506; or
(b) When a new or modified description of economic or other special interest is necessary because of a new major contributor.

Additionally, staff has drafted language, as suggested by representatives from Common Cause and the League of Women Voters, to require, within a time frame chosen by the Commission, pulling from circulation ads that contain inaccurate disclosure information – a "sunset" provision. The following language is presented here for the Commission's consideration, but is not included in the proposed regulation:

All advertisements, however broadcast or otherwise disseminated, must cease to be broadcast or disseminated within [24 hours, 72 hours, seven days] of subdivisions (a) or (b) above [in regulation [18450.5] until and unless they include an accurate disclosure as required by this regulation.

Staff learned from our interested persons meeting that it may take a minimum of seven days to retool advertising to reflect new information. This time frame corresponds to the "seven day" period prior to sending an advertisement to a printer or broadcaster, as found in section 84502 and regulation 18450.2. The concern is that if we give the regulated community a large amount of time to change their advertisements, while still allowing them to run inaccurate advertising, we are doing a disservice to the public and confounding the intent of the disclosure requirements as enacted. By including a "sunset" provision which is somewhat shorter than the time for circulating new advertising, the regulated community has more incentive to correct their disclosure information and the public does not continue to be being exposed to false or misleading disclosure information in advertising.

Staff's concern is that this subsection creates a new potential violation without any statutory authority in the Act. Furthermore, within this statutory scheme, there are two provisions that pertain to enforcement (Government Code sections 84505 and 84510). Section 84510, in particular, allows for civil and administrative remedies for a violation of these statutes.

This language also raises the issue of prior restraint of speech under the First Amendment to the Constitution. The Supreme Court has addressed the issue many times and ruled differently each time on different grounds, noting that:

> Freedom of speech thus does not comprehend the right to speak on any subject at any time…While we have shown a special solicitude for freedom of speech and of the press, we have eschewed absolutes in favor of a more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented. (*Smith v. Daily Mail Publishing Co.* (1979) 443 U.S.97.)

While the issue is implicated by a subdivision requiring the cessation of all advertising pending a new disclosure statement, it remains difficult to gauge whether the state's interest in regulating and protecting the integrity of the electoral process would prevail over an argument raising issues of prior restraint and freedom of speech. If the Commission wishes the staff to incorporate this language in the regulation, staff would research this issue further prior to adoption of the regulation.

Attachments

Exhibit 1 - Government Code Sections 84501-84510
Exhibit 2 - Table of Advertisement Disclosure Code Sections
Proposed amendment to regulation 18402 (Decision Point 6, option 2)
Proposed regulation 18450.1
Proposed regulation 18450.2
Proposed regulation 18450.3 (Decision Point 6, option 3)
Proposed regulation 18450.4
Proposed regulation 18450.5

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